UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL NO. 1456
THIS DOCUMENT RELATES TO: ALL ACTIONS	CIVIL ACTION: 01-CV-12257-PBS Judge Patti B. Saris

CLASS PLAINTIFFS' RESPONSE TO SCHERING'S *TWOMBLY* SUBMISSION

Schering submits *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (U.S. 2007) as supplemental authority. *Twombly* is not applicable.

Twombly is a case involving the pleading standard in an antitrust case where courts often examine economic plausibility at the outset. It has no application at this stage of this case.

Moreover, the notion that economic feasibility was not examined in this case is misplaced. For example, plaintiffs introduced at trial the textbook of Dr. Kolassa. In it Schering's own expert expounded on why generic manufacturers would publish fictitious AWPs and would be motivated to promote the spread. Plaintiffs also introduced dozen of pricing alerts signed by Mr. Weintraub informing Schering/Warrick customers of new spreads between AWP and the real price, and these spreads grew during the Class Period. Plaintiffs introduced documents in which Schering acknowledged that "spread differences" were important in getting the business of customers. And Schering spreads increased dramatically during the Class Period. Schering offered no explanation for this conduct – it was content to rely on graphics of green frogs, attacking a theory that had long passed out of the case. All of this is evidence of economic plausibility.

If that is not sufficient, former CMS Administrator Thomas Scully recently testified that in his experience, generics did without doubt game the system:

> Q. Let's talk about this – this generic with multiple participants in a J Code. In that situation, what you say here about manufacturers being able to use profit margins to get people to buy their drugs doesn't work for generics, does it?
>
> THE WITNESS: I believe it does.
>
> BY MR. DALY:
>
> Q. How would that be?
>
> A. Well, I don't recall all the details, but I remember that ipratropium bromide and ***Albuterol*** were a couple of pennies a dose in reality in the market, and people were charging 25 times that, including the multiple generic manufacturers. ***And that the markup on those respiratory drugs were one of the bigger issues we had. Probably the biggest issue as a pure multiplier factor. So it could, in fact, work on generics.*** (Emphasis added.)

Ex. A at 110:18 – 111:13 (attached hereto).

Mr. Scully picked upon this theme again in his testimony:

> Q. Can you think of a drug during this time period where you have a sole source branded drug where it was discounted in such a way as to increase utilization?
>
> A. I wouldn't say discounted, but the primary ones that I would – ***the thing that drove this, ipratropium bromide/albuterol were one on the generic side***. The other two were probably Remicade on the rheumatoid arthritis side, which I believe was sole source, was high volume for rheumatology. And the other two were Procrit, and then once Aranesp came on the market, they competed with each other theoretically, but they really competed over the spread, which is the thing that got my attention, I spent probably the most time on, because the highest volume, highest cost drugs, which was you could roughly – and I may be wrong on the numbers – buy a two week dose of Procrit. And similar, even though it's a one dose shot for Aranesp for 600 dollars every two weeks, and the markup –

> they were competing in their markups between 1200 and 1700 to drive utilization for physicians.
>
> And you could watch the utilization change depending on how much they marked up their AWP. And I – that was probably the thing that got me most stoked up about changing this policy, ***because they were adjusting their AWPs by generate more market volume by creating incentives for physicians, which was as clear as the sun come up in the morning***.

Id. at 114:4 – 115:10 (emphasis added).

Thus, evidence at trial demonstrated that Schering published phony AWPs and marketed the spread, as does the evidence that continues to come in.

DATED: June 19, 2007

By **/s/ Steve W. Berman**

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CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on June 19, 2007, I caused copies of **CLASS PLAINTIFFS' RESPONSE TO SCHERING'S *TWOMBLY* SUBMISSION** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman
Steve W. Berman

Exhibit A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL	:	MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE	:	CIVIL ACTION
PRICE LITIGATION	:	01-CV-12257-PBS
THIS DOCUMENT RELATES TO	:	
U.S. ex rel. Ven-a-Care of	:	Judge Patti B. Saris
the Florida Keys, Inc.	:	
v.	:	
Abbott Laboratories, Inc.,	:	Chief Magistrate
No. 06-CV-11337-PBS	:	Judge Marianne B.
		Bowler

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA, : Plaintiff, : vs. : Case No.: CV-05-219
ABBOTT LABORATORIES, INC., : Judge Charles Price
et al. : Defendants. :

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN, : CASE NO.
Plaintiff, : 04-CV-1709
v. :
AMGEN INC., et al., : Defendants. :

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSETTS : CIVIL ACTION NO.
Plaintiff, : 03-CV-11865-PBS
v. :
MYLAN LABORATORIES, INC., et al. : Defendants. :

SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

CLIFFSIDE NURSING HOME, INC., on : LAW DIVISION
behalf of itself and all others : DOCKET NO.
similarly situated, as defined : UNN-L-2329-04
herein, : Plaintiffs, :
v. :
DEY, INC., et al. : Defendants. :

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA, and : STATE OF
HENRY D. McMASTER, in his official : SOUTH CAROLINA
capacity as Attorney General for : COUNTY OF
the State of South Carolina, : RICHLAND
Plaintiff, :
v. : CIVIL ACTION NO.
WARRICK PHARMACEUTICALS : 2006-CP-40-4390
CORPORATION, et al. : 2006-CP-40-4399
Defendants. :

STATE OF SOUTH CAROLINA, and : STATE OF
HENRY D. McMASTER, in his official : SOUTH CAROLINA
capacity as Attorney General for : COUNTY OF
the State of South Carolina, : RICHLAND
Plaintiff, :
v. : CASE NO.
ABBOTT LABORATORIES, INC. : 2006-CP-40-4394
Defendant. :

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA, and : STATE OF
HENRY D. McMASTER, in his official : SOUTH CAROLINA
capacity as Attorney General for : COUNTY OF
the State of South Carolina, : RICHLAND
Plaintiff, :
v. : CIVIL ACTION NO.
PAR PHARMACEUTICALS COMPANIES, : 2006-CP-40-7151
INC., : 2006-CP-40-7153
Defendant. :

STATE OF SOUTH CAROLINA, and : STATE OF
HENRY D. McMASTER, in his official : SOUTH CAROLINA
capacity as Attorney General for : COUNTY OF
the State of South Carolina, : RICHLAND
Plaintiff, :
v. : CIVIL ACTION NO.
MYLAN LABORATORIES INC., : 2007-CP-40-0282
Defendant. : 2007-CP-40-0283

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
-----------------------------------X
STATE OF SOUTH CAROLINA, and : STATE OF
HENRY D. McMASTER, in his official : SOUTH CAROLINA
capacity as Attorney General for : COUNTY OF
the State of South Carolina, : RICHLAND
Plaintiff, :
v. : CIVIL ACTION NO.
BARR PHARMACEUTICALS, INC. : 2007-CP-40-0280
Defendant. : 2007-CP-40-0286
-----------------------------------X

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII
----------------------------------X
STATE OF HAWAII, : CASE NO.
Plaintiff, : 06-1-0720-04 EEH
v. :
ABBOTT LABORATORIES, INC., et al. : JUDGE EDEN
Defendants. : ELIZABETH HIFO
----------------------------------X

IN THE COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
THE STATE OF FLORIDA
ex rel.
- - - - - - - - - - - - - - - - - x
VEN-A-CARE OF THE FLORIDA :
KEYS, INC., a Florida :
Corporation, by and through its :
principal officers and directors, :
ZACHARY T. BENTLEY and :
T. MARK JONES, :
Plaintiffs, :
vs. : Civil Action
MYLAN LABORATORIES INC.; MYLAN : No.: 98-3032G
PHARMACEUTICALS INC.; NOVOPHARM : Judge: William
LTD., SCHEIN PHARMACEUTICAL, INC.;: L. Gary
TEVA PHARMACEUTICAL INDUSTRIES :
LTD., TEVA PHARMACEUTICAL USA; :
and WATSON PHARMACEUTICALS, INC., :
Defendants. :
- - - - - - - - - - - - - - - - - x

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
- - - - - - - - - - - - - - - - - x
STATE OF MISSOURI, ex rel, :
JEREMIAH W. (JAY) NIXON, :
Attorney General, :
and :
MISSOURI DEPARTMENT OF SOCIAL :
SERVICES, DIVISION OF MEDICAL : Case No.
SERVICES, : 054-1216
Plaintiffs, : Division No. 31
vs. :
DEY INC., DEY, L.P., MERCK KGaA, :
EMD, INC., WARRICK :
PHARMACEUTICALS CORPORATION, :
SCHERING-PLOUGH CORPORATION, and :
SCHERING CORPORATION, :
Defendants. :
- - - - - - - - - - - - - - - - - x

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT - DIV. II
-----------------------------------X
COMMONWEALTH OF KENTUCKY, : CIVIL ACTION NO.
Plaintiff, : 03-CI-1134
v. :
ABBOTT LABORATORIES, INC., et al. :
Defendants. :
-----------------------------------X

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT - DIV. I
-----------------------------------X
COMMONWEALTH OF KENTUCKY, ex rel. : CIVIL ACTION NO.
GREGORY D. STUMBO, Attorney General: 04-CI-1487
Plaintiff, :
v. :
ALPHAPHARMA, INC., et al. :
Defendants. :
-----------------------------------X
Washington, D.C.
Tuesday, May 15, 2007

Videotaped Deposition of THOMAS A. SCULLY, a witness herein, called for examination by counsel for Abbott Laboratories in the above-entitled matter, pursuant to subpoena, the witness being duly sworn by SUSAN L. CIMINELLI, a Notary Public in and for the District of Columbia, taken at the offices of Jones Day, 51 Louisiana Avenue, Northwest, Washington, D.C., at 8:49 a.m. on Tuesday, May 15, 2007, and the proceedings being taken down by Stenotype by SUSAN L. CIMINELLI, CRR, RPR, and transcribed under her direction.

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the provider gets reimbursed the same amount no matter which individual manufacturer's drug is used within that J Code, correct?

MR. GOBENA: Objection. Form. You're talking about generics, right?

BY MR. DALY:

Q. Yes.

A. In generics?

Q. Yes.

A. I'm sure you're correct. My focus here was much more at the time on Procrit.

Q. On Procrit. Which would be a branded drug, right?

A. Yes. There were certainly abuses in area of ipratropium bromide and Albuterol, which had the same issues with stunning markups that were theoretically generic.

Q. Let's talk about this -- this generic with multiple participants in a J Code. In that situation, what you say here about manufacturers being able to use profit margins to get people to buy their drugs doesn't work for generics, does it?

MR. GOBENA: Objection. Form.

THE WITNESS: I believe it does.

BY MR. DALY:

Q. How would that be?

A. Well, I don't recall all the details, but I remember that ipratropium bromide and Albuterol were a couple of pennies a dose in reality in the market, and people were charging 25 times that, including the multiple generic manufacturers. And that the markup on those respiratory drugs were one of the bigger issues we had. Probably the biggest issue as a pure mulitplier factor. So it could, in fact, work on generics.

Q. Were they -- were those drugs part of a J Code?

A. I assume they were. I'm not sure.

Q. So regardless of which drug within that J Code might have been selected by the provider, the provider would be reimbursed the same amount, right?

MR. GOBENA: Objection. Form.

THE WITNESS: Yes. But the incentive to generate higher utilization was to give them a very

big spread, which was the case all across the board.

BY MR. DALY:

Q. And if you have a single source branded situation, there is just one drug and it's a sole source, that's not a situation -- well, strike that. If single source drug branded, did you believe as you look at this sentence, that in that situation, that prices could be manipulated to increase utilization?

MR. GOBENA: Objection. Form.

THE WITNESS: Yes.

BY MR. DALY:

Q. Do you have -- when you have a single source branded drug, isn't it true that the sales price, the actual acquisition cost is pretty close to the manufacturer's WAC, wholesale acquisition cost, or its list price?

MR. GOBENA: Objection. Form.

MR. BREEN: Objection. Form. Breen, objection, form.

MR. GOBENA: Gobena, objection, form.

THE WITNESS: I would say generally no.

BY MR. DALY:

Q. Generally no. So you feel that a branded drug without competition would discount itself?

A. No. I may have missed your question.

Q. Okay. Let's start all over with sole source. If you have a sole source branded drug?

A. Yes.

Q. It's the only drug that -- you know, there is no real competition for it, there is no J Code, there is no multiple source, drugs like that typically sell pretty close to the drug's list price, right?

MR. GOBENA: Objection. Form.

MR. BREEN: Objection. Form.

BY MR. DALY:

Q. That's been your experience?

MR. GOBENA: Same objection.

THE WITNESS: I would say generally. On the other hand, if you're trying to generate volume and make it attractive to the provider to use more of it, you generally raise your AWP as high as you possibly can imagine, and the physician or the practice group makes a higher profit and they have

incentive to use more, which you can read about in the front page of the paper this week.

BY MR. DALY:

Q. Can you think of a drug during this time period where you have a sole source branded drug where it was discounted in such a way as to increase utilization?

A. I wouldn't say discounted, but the primary ones that I would -- the thing that drove this, ipratropium bromide/albuterol were one on the generic side. The other two were probably Remicade on the rheumatoid arthritis side, which I believe was sole source, was high volume for rheumatology. And the other two were Procrit, and then once Aranesp came on the market, they competed with each other theoretically, but they really competed over the spread, which is the thing that got my attention, I spent probably the most time on, because the highest volume, highest cost drugs, which was you could roughly -- and I may be wrong on the numbers -- buy a two week dose of Procrit. And similar, even though it's a one dose shot for Aranesp for 600 dollars

every two weeks, and the markup -- they were competing in their markups between 1200 and 1700 to drive utilization for physicians.

And you could watch the utilization change depending on how much they marked up their AWP. And I -- that was probably the thing that got me most stoked up about changing this policy, because they were adjusting their AWPs by generate more market volume by creating incentives for physicians, which was as clear as the sun come up in the morning.

MR. GOBENA: Tom, you're going to have to speak a little bit more slowly because the court reporter is having a tough time keeping up with you.

BY MR. DALY:

Q. Lost some people.

A. It was probably the Aranesp and Procrit people dropping off. But I would add, those views were extremely clear in all my testimony and public statements for years.

Q. And Procrit is a drug that is used by what kind of practice area?

A. Procrit and Epo are the identical drug.

Procrit is a J&J drug licensed to use for oncology, and Epo is an Amgen drug. It's identical, it's licensed -- it's manufactured to use for dialysis.

Q. And the --

A. Aranesp is an extended version from Procrit. I think it's once every two-week dosage, but functionally equivalent, as I pointed out in prior lives.

Q. And this was a drug used by oncologists, or those were two drugs --

A. Procrit and Aranesp were used by oncologists to raise red blood cell counts in cancer patients. And the identical drug, Epo, is used for dialysis to raise red blood cell counts for dialysis patients.

MR. BREEN: Is that Epogen?

THE WITNESS: Epogen, Epo.

BY MR. DALY:

Q. And what the oncologists were doing with that drug was they would keep the spread that they got between, say, 95 percent of AWP that they put in the reimbursement for, and what they paid for it, the

oncologists would keep the spread, correct?

MR. GOBENA: Object to the form.

THE WITNESS: Yes. If you could buy Procrit, hypothetically, for 600 dollars for a two-week course of treatment, which I think is six treatments, then you could -- the AWP would vary because it moved, but let's say it was roughly anywhere from 12 to 1700 dollars, I think, while I was at CMS. And so if you were an oncologist, it's an attractive spread.

BY MR. DALY:

Q. And the spread would be -- so the oncologist would keep the spread, correct?

A. Yes.

Q. And what the oncologists had been telling you, and had been telling Congress and CMS over the years was that they needed that spread to make up for inadequate service fees, correct?

MR. GOBENA: Object to the form.

THE WITNESS: That was their contention.

BY MR. DALY:

Q. And the oncologists did, in fact, use that